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August 29, 2002

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND AND ELECTRONIC MAIL

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room
Washington, D.C. 20554

Re: BellSouth Multi-State Section 271 Application
WC Docket No. 02-150 -- *Ex Parte Notification*

Dear Ms. Dortch:

The attached written *ex parte* was submitted today, August 29, 2002, via electronic mail, to William Maher, Chief, Wireline Competition Bureau, Tamara L. Preiss, Chief, Pricing Policy Division, Wireline Competition Bureau, and Charles W. Kelley, Chief, Investigations & Hearings Division, Enforcement Bureau, with copies sent electronically to Christopher Libertelli, Matthew Brill, Daniel Gonzalez, Jordan Goldstein, Scott Bergmann, Aaron Goldberger, Maureen Del Duca and Joshua Swift.

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In accordance with Section 1.1206 of the Commission's rules, an original and one copy of this letter is being filed with your office. If you have any questions concerning this filing, please do not hesitate to contact me.

Respectfully submitted,

John J. Heitmann

JJH/cpa

cc: Christopher Libertelli
Matthew Brill
Daniel Gonzalez
Jordan Goldstein
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August 29, 2002

VIA E-MAIL

Mr. William Maher
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Ms. Tamara L. Preiss
Chief, Pricing Policy Division, Wireline Competition Bureau
Federal Communications Commission
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Mr. Charles W. Kelley
Chief, Investigations & Hearings Division, Enforcement Bureau
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Re: BellSouth Multi-State Section 271 Application, WC Docket No. 02-150
Ex Parte

Dear Mr. Maher, Ms. Preiss and Mr. Kelley:

On behalf of NuVox Communications, Inc. ("NuVox"), I am writing in response to BellSouth's responses to NuVox's claims that BellSouth's current interconnection pricing practices and policies in the five states at issue fail to meet the requirements of section 271 checklist item i.[1] In short, checklist compliance should not be measured by the fact that

[1] *Joint Application by BellSouth Corporation for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Services in the States of Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, BellSouth Reply Comments, Aug. 5, 2002, WC Docket No. 02-150 ("BellSouth Reply

BellSouth has state commission approved rates for interconnection.[2] Instead, it should be measured by the way in which BellSouth makes interconnection available to carriers at those cost-based rates.

As NuVox asserted in its comments filed on July 11, 2002,[3] BellSouth routinely denies it and other carriers interconnection at those cost-based rates by imposing non-cost-based tariffed access charges to all or parts of interconnection trunks and facilities. This is not simply a billing or contract issue, as BellSouth contends.[4] Rather, it is a case of BellSouth systematically denying cost-based access to interconnection in violation of Sections 251(c)(2), 252(d)(1) and 271(c)(2)(B)(1) of the Act and FCC Rules 51.305(a)(3), 51.309(b), 51.503(b) and (c), and 51.505.[5]

NuVox respectfully submits that the Commission cannot turn a blind eye to systematic violations of its own rules – especially not in the context of its review of a section 271 application that assert compliance with such rules. BellSouth should be ordered to cease charging NuVox and other CLECs non-cost-based tariffed access rates for interconnection and to disgorge all revenues gained from that unlawful practice. Until it does so, the current section 271 application should be denied, and BellSouth's existing section 271 authority should be suspended.

Comments"); *Joint Application by BellSouth Corporation for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Services in the States of Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, BellSouth Joint Reply Affidavit of John A. Ruscilli and Cynthia K. Cox, Aug. 2, 2002, WC Docket No. 02-150 ("BellSouth Ruscilli/Cox Reply Aff.").

[2] NuVox does not here challenge whether those rates comport with the commission's pricing rules, although it seems likely that many of the individual rates approved by the various commissions do not.

[3] NuVox filed comments jointly with KMC Telecom on July 11, 2002. These comments will be referred to herein as "NuVox Comments".

[4] Virtually all disputes can be characterized as contract or interconnection agreement claims. However, NuVox has not asserted such claims in this docket. If the Commission were to buy into BellSouth's argument (and its corollary that the Commission ought not entertain such disputes), it would seriously compromise its ability to conduct meaningful review of this and future section 271 applications. Such action also would put in substantial doubt the Commission's desire and willingness to enforce its own rules.

[5] To the extent that BellSouth has charged anything for interconnection trunks and facilities, it also has violated Section 1.7 of Attachment 3 of the NuVox/BellSouth June 2000 Interconnection Agreement, and NuVox will file a complaint based on that separate claim, if BellSouth continues to stonewall in response to NuVox's overtures to settle.

BellSouth's Reply Comments

BellSouth's Reply Comments are a study in issue avoidance. Rather than respond to NuVox's allegations on the merits, BellSouth first suggests that they don't matter and then attempts to recast them as billing disputes (as if they don't matter either). Neither ploy is successful.

First, BellSouth asserts that the fact that its state commissions have set TELRIC rates for interconnection is enough to demonstrate compliance with section 271 checklist item i.[6] NuVox disagrees.[7] Section 271 requires BellSouth to provide "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)."[8] Thus, BellSouth must not only have TELRIC rates, but it must also make available to CLECs interconnection at those rates.[9] To the extent that BellSouth fails to do so, it cannot demonstrate compliance with the competitive checklist.[10]

As NuVox demonstrated in its initial comments, the problem with BellSouth's TELRIC prices for interconnection trunks and facilities is that BellSouth has refused to allow carriers to purchase interconnection at those prices.[11] For years, BellSouth applied straight tariffed access rates – instead of cost-based rates – to interconnection trunks and facilities.[12] Essentially conceding the unlawful nature of that practice, BellSouth began to reform its policies in 2000.[13] This relatively recent reform, however, has not led to BellSouth's allowing CLECs to purchase interconnection at cost-based rates, as they are entitled under the Act and the Commission's orders and rules.[14] Instead, BellSouth now insists on applying jurisdictional factors to interconnection trunks and facilities so that it can "jurisdictionalize" them and apply tariffed access rates to the portions of the facilities that it deems to be non-local.[15] However, nothing in the Act or the Commission's rules permits such ratcheted billing that limits the

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6 BellSouth Reply Comments at 49.
7 NuVox Comments at 3-8.
8 47 USC § 271(c)(2)(B)(i).
9 NuVox Comments at 4.
10 *Id.* at 8.
11 *Id.* at 4-8.
12 The Commission should investigate this practice, as BellSouth should not be entitled such unjust enrichment.
13 The first evidence of this change appears to be the June 1, 2000 carrier notification letter cited by BellSouth in its reply. BellSouth Reply Exhibit JAR/CKC-1.
14 NuVox Comments at 5-8.
15 *Id.*; BellSouth Ruscilli/Cox Reply Aff., ¶¶ 9-12.

application of cost-based rates to the portion of interconnection trunks and facilities used for "local" service.[16]

In its Reply Comments, BellSouth also attempts to recast NuVox's allegations of various violations of the Act and the Commission's orders and rules by BellSouth as contract disputes exclusively that do not impact the Commission's section 271 review. Specifically, BellSouth characterizes NuVox's allegations as a "straightforward billing dispute" about NuVox's rights under a particular interconnection agreement.[17] That inaccurate assertion cannot save BellSouth in this context. NuVox, in this docket, has alleged a failure to comply with the checklist, sections 251 and 252, and the Commission's orders and rules.[18] NuVox may well bring a complaint on these matters before the Commission, but what is before the Commission now goes far beyond a straightforward billing dispute.[19] What NuVox has put before the Commission in this docket is BellSouth's naked disregard for and per se violations of the requirements of checklist item i, sections 251 and 252 of the Act, and the Commission's orders and rules.[20] Indeed, BellSouth's practice of charging non-cost-based tariffed access rates for interconnection is potentially widespread as it is memorialized in its standard interconnection agreement,[21] carrier notices[22] and jurisdictional factors reporting guide [23]. BellSouth's violation

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[16] NuVox Comments at 6-8. Nothing in the NuVox/BellSouth interconnection agreement limits interconnection to local service either. Indeed, the first paragraph of attachment 3 of the NuVox/BellSouth interconnection agreement provides (emphasis added):

> The Parties shall provide interconnection with each other's networks for the transmission and routing of **telephone exchange service (local) and exchange access (intraLATA toll and switched access)** on the following terms[.]

[17] BellSouth Reply Comments at 50.

[18] NuVox Comments at 3-8.

[19] BellSouth has made this anything but a straightforward billing dispute. For example, it has refused true-ups and billing corrections over which there is no conceptual or contractual dispute. Why? Because it is willing to abuse its market power, its management is willing to willfully misrepresent or invent entirely contract provisions and policies, and it has made the assessment that nobody will stop it from doing so or hold the individuals responsible for such actions accountable. In making its assessment that it will get away with fraudulently jacking-up its own revenues and competitors' costs, BellSouth appears to be banking on hopes that the Commission will not act in the context of a section 271 proceeding and that it will be able to convince the Commission that this is a contract matter for individual carriers to chase down in scores of lengthy and costly proceedings before nine different state commissions.

[20] Contrary to BellSouth's assertion, NuVox has demonstrated that BellSouth's interconnection billing practices constitute per se violations of sections 251, 252, 271 and Commission rules 51.305(a)(3), 51.309(b), 51.503(b) and (c), and 51.505.

[21] NuVox Comments at n. 9. Attachment 3 (Network Interconnection) to BellSouth's latest standard interconnection agreement can be found at http://www.interconnection.bellsouth.com/become_a_clec/docs/interconnect/att3_network_interconnection.pdf.

of the Commission's rules thus appears not to be an isolated contract dispute, but rather, a systemic and unlawful scheme affecting an unknown but not insignificant number carriers.[24]

Finally, nothing in NuVox's interconnection agreement suggests, as BellSouth asserts, that the controversy here is a pure billing dispute under the agreement. As explained below, the Agreement contains no provisions that allow for BellSouth's practice of applying non-cost-based tariffed rates for interconnection through ratcheted billing.

Ruscilli/Cox Affidavit

Like BellSouth's attorneys, BellSouth's affiants, Mr. Ruscilli and Ms. Cox ("Affiants") also attempt to recast NuVox's allegations as "contract disputes". However, NuVox has asserted violations of the FCC's rules and a failure to comply with the section 271 checklist, sections 251 and 252 of the Act, the *Local Competition Order,* and a host of Commission rules. If the Commission reviews the Act, the *Local Competition Order,* its rules, and the NuVox/BellSouth interconnection agreement, it will find nothing authorizing the denial of cost-based interconnection to a carrier, such as NuVox, that provides both telephone exchange and exchange access services to its end users through the use of such interconnection facilities.[25] Moreover, the Commission need look no further than the BellSouth website to see that BellSouth's "standard interconnection agreement" and Guide contain policies and practices that flout its rules.[26] Surely, the Commission should neither sanction such a practice nor turn a blind eye to it.

Indeed, the Commission should not allow BellSouth to shield its unlawful and anticompetitive activity with the assertion that there are merely "unresolved interpretive disputes" between two parties.[27] To be sure, there is money at issue here – and lots of it. If NuVox is unable to settle with BellSouth, it will file a complaint separately. In the meantime, and in this docket, however, BellSouth has failed to provide a plausible explanation of how its

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[22] BellSouth June 1, 2000 Carrier Notification SN91081790 (BellSouth Reply Exhibit JAR/CKC-1), BellSouth October 27, 2000 Carrier Notification SN91082013 (BellSouth Reply Exhibit JAR/CKC-2), BellSouth March 13, 2002 Carrier Notification SN91082918 (BellSouth Reply Exhibit JAR/CKC-3).

[23] A copy of Version 2.0 of BellSouth's Jurisdictional Factors Reporting Guide ("Guide") is attached hereto as **Attachment A.**

[24] NuVox notes that at least three other carriers have either made similar allegations or supported those made by NuVox. NuVox Comments at 3-8 (joined by KMC), NewSouth, Aug. 5, 2002 *Ex Parte*, AT&T Reply Comments at 27, n.27. Other carriers affected by BellSouth's ratcheted interconnection billing sham apparently have decided not to devote resources to addressing the issue in this proceeding.

[25] NuVox Comments at 6-8.

[26] *Id.,* at 5-6, n.9; *see also infra* n.21, **Attachment A.**

[27] *See* BellSouth Ruscilli/Cox Reply Aff., ¶ 6.

practice of charging non-cost-based tariffed access rates to NuVox and others for interconnection is lawful under the Act and the Commission's rules and orders. Thus, the instant debate is not about BellSouth's compliance with a particular contract, but is rather about BellSouth's compliance with the Act and the Commission's orders and rules.

Critically, BellSouth has provided no plausible legal justification for its imposition of non-cost-based tariffed access rates on NuVox and other carriers for interconnection. In paragraphs 7 through 12, BellSouth Affiants attempt to recast NuVox's instant allegations as a contract dispute without relying on a single word from the NuVox/BellSouth interconnection agreement. Affiants' vague references to "Attachment 3" (which covers interconnection) and "Exhibit A" (which incorporates state commission approved TELRIC rates for interconnection) are telling.

Affiants claim that the NuVox/Bellsouth interconnection agreement includes a provision for "bill and keep on non-transit trunks and facilities".[28] This is about the only thing affiants have to say on this topic that is true and is not deliberately inaccurate and misleading.[29] Next, Affiants claim that "[t]he contract provisions point to rates in Exhibit A to Attachment 3 of the Interconnection Agreement, and go on to state that if there are no rates in Exhibit A (and thus subject to bill and keep for non-transit use), then the rates from the appropriate tariff will apply."[30] Affiants' statement is designed purely to deceive, as the contract provides for bill and keep without reference to what rates are or are not included in the rate attachment.[31] Nevertheless, where a rate element in the agreement's interconnection price sheets (Attachment 3, Exhibit A) includes a reference to a tariffed rate, the reference is accompanied by a note saying that there will be a true-up (or down) to state-commission approved rates. Indeed, the rate sheet includes a reference to BellSouth's state access tariff for trunk ports, but notes that there will be a true-up upon state commission approval of TELRIC rates.[32] The states have approved

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28 *Id.*, ¶ 8.

29 Section 1.7 of Attachment 3 of the parties interconnection agreement provides:

> The Parties shall institute a bill and keep compensation plan under which neither Party will charge the other Party recurring and nonrecurring charges associated with trunks and facilities for the exchange of traffic other than Transit Traffic. Both Parties, as appropriate, shall be compensated for the ordering of trunks and facilities transporting Transit Traffic.

30 BellSouth Ruscilli/Cox Reply Aff., ¶ 8.

31 *See infra* n.29.

32 NuVox/BellSouth Interconnection Agreement, Attachment 3, Exhibit A (June 30, 2000).

these rates – however, BellSouth has refused to give NuVox (and others) a true-up (actually "down", since the state commission approved rates are lower).[33]

Most critically, however, BellSouth has not used the provisions establishing a default to tariffed rates in the absence of a TELRIC rate as the basis for applying its ratcheted scheme of interconnection billing. As BellSouth acknowledges, the rates exist[34] – BellSouth just refuses to apply them properly. Thus, Affiants appear to be engaging in deliberate deception. As Affiants go on to explain, BellSouth bases its ratcheted scheme of interconnection billing on a web-posted "Guide" and related carrier notifications. None of these documents, however, are referenced or incorporated in the NuVox/BellSouth interconnection agreement which predates all of them.[35] Therefore, BellSouth Affiants' conclusion that "[b]ill and keep, therefore, applies only to the local portion of the rates" is as bogus as it is incomprehensible.

Indeed, the Commission may ask itself (and BellSouth) what Affiants mean by the assertion that "[b]ill and keep . . . applies only to the local portion of the rates". Based on a long and fruitless series of exchanges with BellSouth on this topic, NuVox is able to translate this language with which BellSouth has deliberately sought to confuse. It means that, according to BellSouth, bill and keep and cost-based interconnection is available for only local traffic and not for exchange access traffic. This misinformed point of view is reflected in the BellSouth Jurisdictional Factors Reporting Guide ("Guide") and carrier notifications to which BellSouth's Affiants next refer the Commission. Notably, the history of this Guide and the Carrier Notices go back to only June of 2000[36] – underscoring that BellSouth's practice of ratcheted interconnection billing is a relatively recent invention that has no basis in the 1996 Act or the Commission's orders and rules implementing it. As explained next, the history of these documents going forward from that date is also instructive.

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[33] The Commission should investigate BellSouth's refusal to honor commitments to perform such true-ups. As part of the investigation, the Commission should determine the breadth and extent of this practice.

Similarly, the Commission should investigate chronic misbilling by BellSouth that appears to be driven by a "let's see if it will stick" form of willful negligence. The accounting ramifications of systematic misbilling and failure to resolve disputes by BellSouth are likely to be substantial.

[34] *BellSouth Reply Comments at 49-50.*

[35] The Commission should investigate BellSouth's attempts to impose contract changes on its competitors through unilateral website notification. BellSouth recently appears to have adopted this as its preferred means of imposing its will upon its competitors and of rewriting agreement provisions it no longer intends to honor. However, the practice cannot be squared with state contract law nor the requirements of the Act that require that the parties negotiate and state commissions approve interconnection agreements.

[36] Prior to that, NuVox believes that BellSouth charged full tariffed access rates for interconnection trunks and facilities – which BellSouth forces carriers to order through the ASR process.

In paragraph 9 of their Joint Affidavit, Affiants provide a cursory explanation of BellSouth's ratcheted interconnection billing scheme, which, they claim, has its basis in BellSouth's web-posted Guide. Although Affiants allege that NuVox raises a contract dispute, here they are pointing to a process and URL that are not part of nor referenced in the NuVox/BellSouth interconnection agreement.[37] The URL provided by Affiants is a link to the BellSouth Jurisdictional Factors Reporting Guide. Version 1.0 of the Guide was posted by BellSouth on August 15, 2001. Obviously, the Guide and the factors it describes (including PLF) cannot be part of the NuVox/BellSouth interconnection agreement, which predated the initial posting of the Guide by more than a year. Version 2.0 of the Guide was released on December 21, 2001, with the only noted change being the introduction of a form for reporting PLF. Version 3.0 of the Guide was released earlier this month – on August 2, 2002.

The change to the Guide introduced in August 2, 2002 is worth noting because it illustrates the brazen nature of BellSouth's unlawful efforts to raise competitors' costs and artificially inflate its own reported revenues by maximizing the amount of non-cost-based tariffed charges that it seeks to impose via its application of a PLF and jurisdictional factors-based ratcheted interconnection billing. Prior to August 2, 2002, the Guide, consistent with BellSouth's state and federal tariffs regarding PIU reporting, provided that, in the absence of a reported PIU or PLF factor, BellSouth would impose "a default value of 50%", if BellSouth was unable to determine an accurate factor for itself.[38] In August 2002, this language was modified to hack-off the last two words, "of 50%", so that the applicable default value is now unspecified.

The reason for this is that in practice, BellSouth has compounded the malfeasance of applying jurisdictional factors-based ratcheted interconnection billing (which has no basis in the Act, the Commissions orders and rules – or the NuVox/BellSouth interconnection agreement) by applying a default value of 0% for missing factors (even though its Guide and carrier notifications specified a 50% default value). As a result, BellSouth maximizes its billings by billing none of the interconnection trunks and facilities at the cost-based rate (replaced by bill and keep in the NuVox/BellSouth interconnection agreement) and instead billing all interconnection trunks and facilities at tariffed access rates. Thus, in practice, BellSouth has failed to even comport with its own Guide and carrier notifications[39] for applying jurisdictional factors-based ratcheted interconnection billing. Rather than correct the billing that is incorrect – even under its own unfounded view of its obligation to provide cost-based access to

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[37] In contrast, the process and the BellSouth Jurisdictional Factors Reporting Guide linked to the URL provided are incorporated into the BellSouth standard interconnection agreement (which NuVox did not adopt). *See infra*, n.21 and **Attachment A**.

[38] Guide at 14 (section 6.0)

[39] The BellSouth October 27, 2000 Carrier Notification SN91082013 also specifies a 50% default factor (BellSouth Reply Exhibit JAR/CKC-2).

interconnection, BellSouth instead chose to amend its Guide so that it can continue charging its competitors inflated non-cost-based tariffed state access rates for all interconnection trunks and facilities. This is an unabated and unlawful sham and those that perpetrate and perpetuate it should be held accountable.

BellSouth's carrier notifications also provide no legal or contractual justification for BellSouth's imposition of non-cost-based rates for interconnection on NuVox and other competitors. Web-posted carrier notifications neither change law nor contracts. Moreover, Affiants once again aim to deceive with their descriptions of these carrier notifications. The initial carrier notification cited by BellSouth actually indicates that application of a new PLF regime for ratcheted interconnection billing was targeted to be implemented as of August 1, 2000, subject to state and federal commission approval of various tariff changes implementing the new reporting process.[40] However, since June 1, 2000, NuVox is aware of no state or federal tariff that includes an obligation to report PLF, nonetheless, any interconnection agreement amendment that incorporates the PLF factor into its agreement with BellSouth. Tellingly, Affiants include a tariff reference for the new PIUe factor, but none for the PLF factor.[41]

The second carrier notification cited by BellSouth, an October 27 notification, merely informed carriers that BellSouth's tariff changes had been approved.[42] Again, however, none of those tariff changes included the PLF factor. The final carrier notification was issued on March 13, 2002 and this notification purports to remind carriers of their "contractual agreement with BellSouth" to report PLF factors. This notification was posted after a series of heated carrier-to-carrier conference calls between NuVox and BellSouth regarding BellSouth's unlawful imposition of non-cost-based tariffed rates to interconnection trunks and facilities ordered and used by NuVox. During these calls and in associated e-mails, it was noted repeatedly that the NuVox/BellSouth interconnection agreement contained no link to the Guide and no mention of PLF (and the March 13, 2002 carrier notification did not change any of those facts).

In paragraph 11 of their affidavit, Affiants disingenuously assert that NuVox's "billing dispute" transpired for several reasons. First, BellSouth claims that it did not receive PLF factors from NuVox "in a timely manner" and thus, its "billing system defaults to zero for the PLF factor", indicating that NuVox has no local traffic.[43] First, neither the Act nor the Commission's rules permit BellSouth to impose a PLF reporting requirement[44] and it is also not provided for in the NuVox/BellSouth interconnection agreement. Second, even if NuVox had an

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40 BellSouth June 1, 2000 Carrier Notification SN91081790, at 1 (BellSouth Reply Exhibit JAR/CKC-1).
41 BellSouth Ruscilli/Cox Reply Aff., ¶ 9, n.1.
42 BellSouth October 27, 2000 Carrier Notification SN91082013 (BellSouth Reply Exhibit JAR/CKC-2).
43 *Id.*, ¶11.
44 NuVox Comments at 6-8.

obligation to report a PLF, Bellsouth's application of a zero percent default factor is contrary to its own PLF Guide (prior to August 2, 2002, when BellSouth amended the Guide to eliminate its own self-imposed obstacle to maximizing revenues gained from its unlawful imposition of jurisdictional factors-based ratcheted interconnection billing). Thus, Affiants' allegation that NuVox was "charged (appropriately for the available information) tariffed access rates for interconnection trunks and facilities" is an undeniable admission that is neither saved nor mitigated by Affiants' hollow assertion that such billing – based on a unilaterally manufactured reporting requirement and artificially revenue maximizing default factor – was appropriate.[45]

Next, Affiants assert that BellSouth has received a PLF factor from NuVox and "billing now reflects bill and keep for the rates found in Exhibit A of Attachment 3 of the Parties' Interconnection Agreements, for the facilities determined to be local."[46] This, too, is an admission that BellSouth has failed and continues to fail to comply with checklist item i. As NuVox set forth in its initial comments, cost-based interconnection is not limited to facilities determined to be local.[47] No such limit exists in the Act, the Commission's orders and rules – or in the contract.

Indeed, as is the case with BellSouth's Reply Comments, BellSouth's Affiants fail to respond to the legal arguments set forth by NuVox in its initial comments. Affiants have described BellSouth's practice of jurisdictional factors-based ratcheted interconnection billing, but have failed to demonstrate why it is not inconsistent with the Act and the Commission's orders and rules. As NuVox set forth in its initial comments,[48] in its *Local Competition Order*, the Commission affirmed that a requesting carrier such as NuVox is entitled "under the statute to

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45 The Commission should investigate the breadth and scope of BellSouth's unlawful practice.

46 BellSouth Ruscilli/Cox Reply Aff., ¶ 11. In December 2001, NuVox did report PLF factors to BellSouth in order to mitigate the ongoing accrual of damages. As BellSouth knows, NuVox has had difficulty tracking and auditing BellSouth's bills, which BellSouth's own billing manager readily describes as "inscrutable". BellSouth has used this as a pretense for refusing to effectively address or settle billing disputes created by BellSouth's unlawful imposition of non-cost-based rates for interconnection. Rather than provide a true-up or refund over-billings, BellSouth simply propounds requests for more information (most, if not all, of which it is certain to already have).

Affiants further allege that NuVox "requested that BellSouth rerate amounts billed prior to provision of the correct factors". This is not accurate. In fact, NuVox requested a refund of all amounts billed for non-transit trunks and facilities – regardless of whether it was before or after BellSouth replaced its zero percent default PLF with a PLF provided by NuVox (which range from 94-97%). Affiants also disingenuously assert that "BellSouth has been actively working to resolve this issue directly with KMC and NuVox through negotiations." BellSouth has stiff-armed NuVox's attempts to settle these matters. Moreover, NuVox and BellSouth have not had any negotiations on these issues in months (NuVox first raised these issues with BellSouth in late 2001). Earlier this week, NuVox once again invited BellSouth to take steps to settle (at least with respect to the immediate relations between the parties) and BellSouth declined.

47 NuVox Comments at 6-8.

48 *Id.*

obtain interconnection pursuant to section 251(c)(2) for the 'transmission and routing of telephone exchange service and exchange access.'"[49] Indeed, the Commission specifically rejected the point of view – espoused by BellSouth – that cost-based interconnection is only for "local traffic" by determining that "parties offering only exchange access are permitted to seek interconnection pursuant to section 251(c)(2)."[50] Thus, a requesting carrier offering either telephone exchange service or exchange access – or both telephone exchange service and exchange access – is entitled to cost-based interconnection. NuVox provides both telephone exchange service and exchange access services and thus is clearly entitled to cost-based interconnection under the Act and the Commission's rules.

In its initial comments,[51] NuVox also explained that the Commission has determined that the only instance under the Act and the Commission's rules where a requesting carrier is *not* entitled to cost-based interconnection is where the requesting carrier is *exclusively an IXC* and it "requests interconnection *solely* for the purpose of originating or terminating its *interexchange* traffic."[52] Thus, BellSouth's practice of charging NuVox and other CLECs access rates for interconnection and its new PLF/ratcheted interconnection billing scheme do not comport with the Act or the Commission's rules. Under the Commission's rules, a carrier either pays cost-based rates for interconnection or – if that carrier seeks interconnection only for the purpose of originating or terminating its own interexchange traffic – it pays tariffed access rates. Since NuVox provides both telephone exchange and exchange access services, it is plainly entitled to cost-based interconnection under the Act and the Commission's *Local Competition Order* and rules.

In response, BellSouth Affiants supply nothing more than a quote from the Commission's now remanded *Order on Remand* concerning reciprocal compensation for ISP-bound traffic.[53] First, the instant dispute is not about reciprocal compensation/transport and termination issues addressed in the *Order on Remand*. The dispute is about interconnection – which the Commission has recognized is different from transport and termination.[54] BellSouth's

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[49] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, cc Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶ 190. (quoting 47 USC § 251(c)(2)); *see also id.* ¶¶ 176; 184-85, 191 (*"Local Competition Order"*).

[50] *Id.*, ¶ 185.

[51] NuVox Comments at 6-8.

[52] *Id.*, ¶ 191 (emphasis added).

[53] BellSouth Ruscilli/Cox Reply Aff., ¶ 13 (quoting and citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Remand and Report and Order, ¶ 38, 16 FCC Rcd 9151 (2001)).

[54] *Local Competition Order*, ¶ 176.

attempts to confuse and conflate interconnection with transport and termination have no basis in the Act or the Commission's rules.

Second, with the quoted text, Affiants' appear to suggest that the Commission and the Eighth Circuit did something that they simply did not do. Neither the Commission, in its *Order on Remand,* nor the Eighth Circuit, in *CompTel,* upended the *Local Competition Order* holding that requesting carriers are entitled to section 251(c)(2)/section 252(d)(1) interconnection for the provision of telephone exchange and/or exchange access and that only carriers exclusively providing interexchange services would not be entitled to such interconnection (those traditional IXCs would continue to purchase exchange access from a LEC and pay minute of use "access charges" for that service). As noted above, the now remanded *Order on Remand* addressed reciprocal compensation – not interconnection. Moreover, the Commission in its *Order on Remand* did not find that section 251(g) provides BellSouth or other ILECs with a way around their obligation to provide cost-based interconnection for requesting CLECs such as NuVox that provide telephone exchange and/or exchange access services.

In *CompTel*, the Eight Circuit affirmed the FCC's *Local Competition Order* decision that carriers exclusively providing interexchange services were not entitled to cost-based interconnection.[55] The Court did not suggest that section 251(g) served as a means for allowing BellSouth and others to charge tariffed "access charges" (special and "switched-dedicated" as opposed to switched access) to competing LECs seeking interconnection for the purpose of providing exchange access to themselves and others.[56] Rather, the Court merely affirmed the Commission's decision that traditional IXCs (those that chose not to also become CAPs or LECs)[57] could not avoid per minute originating and terminating "access charges" by purchasing interconnection.[58] Indeed, the Court rejected arguments made by the traditional IXCs, noting that if an IXC wanted to become a LEC as well and provide exchange access service to itself, it would be entitled to cost-based interconnection.[59] Thus, although BellSouth tries to use the label "access charges" to expand the scope of any exemption that may remain under section 251(g), such an exemption has never permitted BellSouth or other ILECs to charge non-cost-based rates out of their access tariffs for the network elements used to establish interconnection between competing providers of exchange access. Under the Act and the Commission's orders and rules, such rates must be cost-based TELRIC rates.

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55 *See Competitive Telecommunications Ass'n v. FCC,* 117 F.3d 1068, 1072-73 (8th Cir. 1997)("*CompTel*").

56 *Id.*

57 NuVox provides both telephone exchange and exchange access services – it is not a traditional IXC.

58 *See CompTel,* 117 F.3d at 1072-73.

59 *Id.* at 1073.

Third, BellSouth fails to disclose that the quoted text it relies on is from an order that has been remanded and may yet be vacated.[60] In *WorldCom,* the Court found the scope of section 251(g) to be quite limited and not subject to creative and expansive interpretation advocated by the ILECs and adopted by the Commission in the *Order on Remand.*[61] Moreover, the Commission has never before found that section 251(g) serves the purpose that BellSouth Affiants suggest it does.[62] Indeed, as NuVox explained in its initial comments, the Commission itself already has rejected BellSouth's section 251(g) argument in its 1996 *Local Competition Order.* There, the Commission explicitly found that Section 251(g) "does not apply to the exchange access 'services' requesting carriers may provide themselves or others after purchasing unbundled elements."[63] As NuVox asserted previously, "[g]iven that the pricing standards of Section 252(d)(1) govern both interconnection and network element charges, the same conclusion certainly applies to interconnection."[64] In sum, neither the *Order on Remand* nor section 251(g) permit BellSouth to deny NuVox and other CLECs cost-based access to interconnection.

Finally, NuVox notes that Mr. Ruscilli, provided a different explanation to the South Carolina commission when he sought to defend BellSouth's unlawful imposition of non-cost-based state access tariff rates to interconnection trunks and facilities used by NuVox and other competitors. Rather than trying to confuse and conflate checklist item i (interconnection) with transport and termination/reciprocal compensation (checklist item xiii), there, relying on cites to the Commission's Fourth Further Notice of Proposed Rulemaking in CC Docket 96-98 and *Supplemental Order Clarification* in the same docket, Mr. Ruscilli deliberately sought to deceive the South Carolina commission by mischaracterizing the issue as being one impacted by

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60 *WorldCom v. FCC,* 288 F.3d 429 (D.C. Cir. 2002)(*"WorldCom"*); *see also* Order of July 15, 2002, D.C. Circuit Nos. 01-1218, *et al.* (ordering the FCC to respond to petitioners' request for rehearing and rehearing en banc, which raised arguments as to whether the Court should have vacated the *Order on Remand* given its flat rejection of the legal basis for actions taken therein).

61 *WorldCom,* 288 F.3d at 432 ("We agree with petitioners that § 251 (g) is not susceptible to the Commission's reading."), 433-34 (finding that LECs' services to other LECs are not encompassed by section 251(g)), 434 ("§ 251 (g) does not provide a basis for the Commission's action").

62 As the *WorldCom* Court recognized, Congress intended a rather limited role for section 251 (g) and, consistent with that intention. the Commission had previously interpreted section 251(g) to have a very narrow scope. *WorldCom,* 288 F.3d at 432-33 (citing H.R. Re. 104-458, at 122-23 (1996), U.S. Code Cong. & Admin. News 1996, 10, 134 and *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability,* 15 FCC Rcd 385, 407, ¶ 47).

63 NuVox Comments at 7-8 (citing *Local Competition Order,* ¶ 362 (explaining that the "primary purpose of section 251(g) is to preserve the right of interexchange carriers to order and receive exchange access services if such carriers elect not to obtain exchange access through their own facilities or by the means of unbundled elements purchased from an incumbent.")).

64 NuVox Comments at 8.

the Commission's temporary use restrictions on circuits converted from special access to UNE combinations.[65]

Neither the Commission's Fourth Further Notice of Proposed Rulemaking in CC Docket 96-98 nor the temporary use restrictions imposed on the EELs converted from special access in its *Supplemental Order Clarification* have anything to do with BellSouth's obligation to provide cost-based access to interconnection. Nor do either of those documents provide any basis for BellSouth to impose non-cost-based tariffed rates for interconnection trunks and facilities. Nevertheless, that did not stop BellSouth and Mr. Ruscilli from deliberately deceiving the South Carolina commission on these points.

The issue here is not about reciprocal compensation or section 251(g).[66] Nor is it about the Commission's temporary use restrictions on conversions of special access to UNE combinations.[67] And it is not about any professed concern the Commission may have over any erosion in the ILECs bloated special access revenues or the impact that might have on unrelated universal subsidies.[68] Instead, the issue presented by NuVox in its initial comments is whether BellSouth's attempts to limit its obligation to provide cost-based interconnection to "local traffic" violates the Act, the *Local Competition Order* and the Commission's rules.[69] As NuVox demonstrated in its comments, and as BellSouth has failed to refute, BellSouth's imposition of non-cost-based tariffed access rates to interconnection trunks and facilities used by NuVox for the provision of telephone exchange and exchange access clearly violate Sections 251(c)(2), 252(d)(1) and 271(c)(2)(B)(1) of the Act and FCC Rules 51.305(a)(3), 51.309(b), 51.503(b) and (c), and 51.505. Accordingly, the Commission cannot find that BellSouth satisfies checklist item i.

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The tone of this letter is harsh and it is intended to be so. BellSouth has broken the law, imposed higher costs on NuVox and its competitors, and has offered little more than deliberate deception in its defense. NuVox is frustrated with BellSouth and the Commission should be as well. Thus, NuVox respectfully asks that the Commission take all steps necessary

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65 BellSouth Rebuttal Testimony of John A. Ruscilli, South Carolina PSC Docket No. 2001-209-C (July 16, 2001)("BellSouth Ruscilli SC Rebuttal Testimony"). For convenience, the relevant excerpt from Mr. Ruscilli's South Carolina testimony is attached hereto as **Attachment B.** Related Direct Testimony and Surrebuttal Testimony of NuVox witness Jerry Willis, is attached hereto as **Attachment C.**

66 BellSouth Ruscilli/Cox Reply Aff., ¶¶ 13-14.

67 BellSouth Ruscilli SC Rebuttal Testimony, ¶¶ 18-20.

68 *Id.*

69 NuVox Comments at 3-8.

to ensure that the checklist violation demonstrated by NuVox is corrected in all nine of BellSouth's states (including the five included in the instant application, the two subject to BellSouth's recently approved Section 271 application, and the two that will be subject to the next application). There is no better time for the Commission to demand compliance with the Act and its rules than now. Moreover, NuVox respectfully requests that the Commission open an investigation to address each of the requests for investigation made herein. BellSouth should be made to disgorge its ill-gotten gains resulting from its fraudulent ratcheted interconnection billing scheme and it should know that the violations of the Commission's rules will neither be rewarded nor tolerated.

NuVox hopes that the Commission will give its allegations serious consideration and specifically asks that the Commission not play into BellSouth's hands by suggesting that NuVox has to take its allegations of federal law violations to multiple state commissions. Please address any inquiries regarding this letter and matters raised herein to the undersigned counsel.

Respectfully submitted,

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Attachment A